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SUBCONTRACTING PLANS: A PRIMER

AGENDA

- Statutory requirements
- Types of subcontracting plans
- Content of subcontracting plans
- Contracting officer responsibilities
- ACO responsibilities
- Role of the SBA
- Liquidated damages

WHAT IS A SUBCONTRACTING PLAN?

- A document, incorporated into certain federal contracts, that contains the prime contractor's plan for ensuring that small business concerns, will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance

STATUTORY REQUIREMENTS

- Section 8(d) of the Small Business Act (15 U.S.C. 637(d) requires subcontracting plans for contracts and contract modifications—
  - Exceeding $650,000 ($1.5 million for construction); and
  - Having subcontracting possibilities

EXCEPTIONS

- Subcontracting plans not required—
  - From small business concerns
  - For personal services contracts
  - For contracts or contract modifications that will be performed entirely outside the U.S. and outlying areas
  - For contract modifications within the general scope of the contract if the contract does not contain FAR 52.219-8.

SUBCONTRACTING PLAN CONTENTS

- 11 Elements including—
  - Goals for subcontracting to SB, SDB, WOSB, HUBZone SB, VOSB, and SDVOSB (stated in $ and as % of total subcontract dollars)
  - A description of the method used to identify potential sources for solicitation purposes
  - The name of an individual who will administer the offeror's subcontracting program, and a description of the duties of the individual

TYPES OF SUBCONTRACTING PLANS

- Individual contract plan
- Master plan
- Commercial plan
- Comprehensive subcontracting plan

CONTRACTING OFFICER RESPONSIBILITIES

- Determine the need for a plan
  - Dollar thresholds met?
  - Subcontracting possibilities?
  - Do any exceptions apply?
- Provide the SBA an opportunity to review solicitation requiring submission of a plan prior to issuance

CONTRACTING OFFICER RESPONSIBILITIES

- Obtain the plan
  - Typically requested from apparent successful offeror prior to award
  - In negotiated acquisitions, may request from all offerors with initial proposals
  - For contract modifications, do not request a separate plan—request a modification to the existing plan

CONTRACTING OFFICER RESPONSIBILITIES

- Review the plan
  - All 11 elements present?
  - Realistic goals compared to past efforts?
    - Not too high as to significantly increase cost
    - Not too low to minimize exposure to liquidated damages
  - All goals > 0%?
  - SDB goal > 5%?
- Obtain advice from small business specialist

CONTRACTING OFFICER RESPONSIBILITIES

- Contract award
  - Consider compliance with previous subcontracting plans as a factor in determining responsibility
  - Notify the SBA procurement center representative of the opportunity to review the proposed contract
  - Determine if any fee may be payable and ensure adequate funds are committed
  - Ensure that an acceptable plan is incorporated into and made a material part of the contract

CONTRACTING OFFICER RESPONSIBILITIES

- Postaward
  - Notify cognizant SBA area office of award
  - Provide subcontracting plan to SBA PCR
  - Notify SBA PCR of opportunity to review modifications to plans
  - Forward plan to contract administration office
  - Assess liquidated damages (if warranted)
  - Acknowledge receipt of reports in eSRS

ACO RESPONSIBILITIES

- Assist contracting officer in evaluating plans
- Monitor contractor compliance with plan
- Evaluate and document contractor performance in carrying out plan
- Immediate notice if the contractor is failing, or has failed, to comply in good faith with the subcontracting plan

LIQUIDATED DAMAGES

- Statutory requirement (15 U.S.C. 637(d)(4)(f))
- “Failure to make a good faith effort to comply with the subcontracting plan,” means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan (FAR 19.701)
- Damages difference between actual and goal

LIQUIDATED DAMAGES

- Failure to achieve goals not same as failure to make good faith effort to comply with plan
  - Unavailability of anticipated sources
  - Unreasonable proposed subcontract prices

LIQUIDATED DAMAGES

- Indicators of failure to make a good faith effort
  - a failure to attempt to identify, contact, solicit, or consider for contract award small business concerns
  - a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan
  - a failure to submit the ISR, or the SSR, using the eSRS, or as provided in agency regulations

LIQUIDATED DAMAGES

- Indicators of failure to make a good faith effort
  - a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan
  - the adoption of company policies or procedures that have as their objectives the frustration of the objectives of the plan

LIQUIDATED DAMAGES

- Assessment of liquidated damages
  - Contracting officer issues final decision with demand for payment (Government claim)
  - Contractor has right to appeal decision pursuant to the Disputes clause.

QUESTIONS?

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